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Supreme Court of the United States

OCTOBER TERM 1938.

No. 195

SOCONY-VACUUM OIL COMPANY, INC.,
Petitioner,

—against—

HERBERT A. SMITH, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY B. POTTER,
Counsel for Petitioner.

LOUIS MEAD TREADWELL,
Of Counsel.

THE COURT PRESS, N. Y. C.

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OCTOBER TERM, 1938.

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SOCONY-VACUUM OIL COMPANY, INC.,
Petitioner,

—against—

HERBERT A. SMITH, JR.,
Respondent.

Petition for Writ of Certiorari.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit in the above case.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition seeks to review a judgment affirming a judgment of the District Court for the Southern District of New York, entered on the verdicts of a jury, for personal injuries alleged to have been sustained by the respondent on June 2, 1935, in the course of his employment as an oiler aboard the petitioner's Steamship "Yankee Arrow".

The action was brought under the Jones Act (Section 33 of the Merchant Marine Act of 1920; U. S. C.

Title 46, Sec. 688) and was based on the alleged negligent failure to provide respondent with a safe place in which to work.

The answer denied generally and pleaded as affirmative defenses Contributory Negligence and Assumption of Risk (R. 8-10).

The Facts.

Respondent was employed as an oiler, working in the engine room of the S. S. "Yankee Arrow", owned and operated by petitioners and bound on a voyage from Baltimore, Maryland, to Beaumont, Texas (R. 35). Shortly before the vessel arrived at Beaumont and on June 2, 1935, respondent claims he tripped on a defective step plate and fell on the floor plates of the engine room. The defect claimed was that a supporting bracket or strut under the step plate was out of place (R. 45, 95). Respondent claims that when he attempted to step down from this step plate, after feeling of the low pressure journal, he was tripped and caused to fall by this supporting bracket (R. 36, 101). His testimony regarding the alleged defect and the cause of his fall is uncorroborated by any one.

Respondent sustained only slight abrasions to the fingers of his left hand and back. He sustained no fractures.

At the time of the accident he was 35 years of age (R. 75) and an experienced oiler (R. 77, 132). He had a high school education (R. 122). He was perfectly familiar with the conditions in the engine room (R. 88). He had performed the same task thousands of times (R. 93). He claims that he knew the step plate had been defective for several weeks (R. 45, 46). He was working under general orders (R. 20, 37). He received no specific

instructions to use the step plate. The step plate was not designed or intended for use while the vessel was at sea (R. 282, 283, 300, 350, 356, 357) but was intended to be used while making repairs in port (R. 282, 285, 300, 347, 357). The petitioner had no reason to anticipate that any one would use this step plate while the vessel was at sea and the engine moving (R. 341). In fact it was not necessary for respondent to use it (R. 283, 300 and 350). A safe method and place was furnished him. He could have stood on the floor of the engine room to perform his task (R. 283, 299, 345, 350, 356, 361).

The First Assistant Engineer never saw respondent or any of the other oilers standing on the step plate to feel the bearing and insists it was dangerous to do so (R. 341 and 350). All of the officers and crew except respondent testified positively that the step plate was not defective; that it never had a supporting bracket under it; that it was held in place by two bolts and that it was not necessary to use it to feel the bearing (R. 266, 267, 277, 283, 301, 333, 337, 348, 357).

The trial court in its charge omitted any reference to the defense of assumption of risk. At the conclusion of the charge the following occurred (R. 419, 420):

> "Mr. Potter: I ask your Honor to charge that if they believe that Mr. Smith, the plaintiff, could have felt the bearing while standing with both of his feet on the floor plate and that it was not necessary for him to stand up on the step plate, he assumed the risk of any injury he may have sustained.
>
> The Court: I refuse so to charge.
>
> Gentlemen, I charge you now that the ship owner is under a duty to furnish a seaman with

a safe place in which to work, give him safe appliances and safe tools, and that is his duty. There is no contributory negligence or assumption of risk on the part of a plaintiff in so far as the defendant fails in these duties.

Mr. Potter: May I have an exception, sir?

The Court: Exception."

The jury returned verdicts for respondent on which judgment was entered (R. 25, 26).

Petitioner's principal contention on appeal to the Circuit Court of Appeals was that respondent, having a choice between an obviously safe and an obviously unsafe method of doing his work, assumed the risk incident to voluntarily selecting the latter.

The Circuit Court of Appeals, after pointing out that "This point was sharply raised by the refusal of the trial judge to recognize assumption of risk as a defense under any circumstances", affirmed the judgment below.

The Question of Law.

In affirming the judgment of the District Court, the Circuit Court of Appeals decided that a seaman who is given a safe place in which to work and voluntarily abandons it for an obviously unsafe place can nevertheless recover under the Jones Act if injury results.

This decision squarely reverses the uniform prior holdings in this and other Circuits.

The Circuit Court of Appeals justified its reversal of the uniform prior holdings by the decision in the *Arizona*[1] and *Beadle*[2] cases in which this Court held

1 *The Arizona* v. *Anelich* (1936), 298 U. S. 110, 80 L. Ed. 1075.
2 *Beadle* v. *Spencer*, (1936), 298 U. S. 124, 80 L. Ed. 1082.

in cases where a seaman had no choice of working places that assumption of risk was no defense to an action for injuries resulting from negligent failure to provide a safe place to work.

Petitioner respectfully contends that this radical change in the law was not justified by the cases cited. In neither case was there any choice of working places or equipment. This Court expressly stated that the Jones Act did not change the previously existing rule as to the availability of assumption of risk as a defense in suits to recover for injuries to seamen.

It had previously been the law that this defense was not available in the circumstances of those cases, since a seaman at sea has no real choice to use or reject the only equipment provided for him.

Where, however, he has a choice between obviously safe and obviously unsafe equipment, the rule has been as uniformly the other way.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals for the Second Circuit has decided a question of law of widespread importance to shipowners and operators in a way probably untenable and in conflict with the weight of authority.

2. The decision is in conflict with decisions of the Circuit Courts of Appeals for the Fifth and Ninth Circuits.

3. The decision is probably in conflict with applicable decisions of this Court. In any event, it involves the interpretation of the decisions of this

Court in *The Arizona* v. *Anelich* and *Beadle* v. *Spencer*.

4. The decision conflicts with that of the Circuit Court of Appeals for the Fifth Circuit as to the effect of the decisions of this Court in *The Arizona* v. *Anelich* and *Beadle* v. *Spencer*.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue to review the decision below.

Dated, July 9th, 1938.

SOCONY-VACUUM OIL COMPANY, INC.,
By HENRY B. POTTER,
Counsel for Petitioner.

LOUIS MEAD TREADWELL,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1938.

No.

SOCONY VACUUM OIL COMPANY, INC.,
Petitioner,

—against—

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Second Circuit in this case is to be found reported in 96 Fed. (2d) 98.

II.

Statement of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of Congress of February 13, 1925 (U. S. C., Title 28, Section 347). The judgment to be reviewed was filed on April 11, 1938.

III.

Statement of the Case.

The facts, rulings of the courts below and questions presented are set forth in the foregoing petition, pages 1-5 thereof.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in sustaining the refusal of the trial court to submit the issue of assumption of risk to the jury under proper instructions and in affirming the judgment of the District Court.

Summary of Argument.

1. The rules as to the defense of assumption of risk in an action under the Jones Act have been well settled.

(a) A seaman assumes the risks normally incident to his calling.

(b) Because of the peculiar nature of the seaman's relationship with his employers while at sea, he does not assume the risk of negligently unsafe equipment or working place even though such condition is known to him.

(c) Where, however, the seaman voluntarily abandons the safe, for an unsafe, equipment or working place, he assumes the risk incident to such choice.

2. The *Arizona* and *Beadle* cases in no way modified the rules as above stated.

3. The opinion below in stating that "a sailor cannot be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice" creates a new rule of law contrary to the uniform prior holdings.

This new rule is not justified by the *Arizona* and *Beadle* cases, but is contrary to the principles they set forth.

4. The lower court's interpretation of these cases is in conflict with that of the Circuit Court of Appeals for the Fifth Circuit.

5. Improper denial of the defense of Assumption of Risk is not cured by the existence of the defense of Contributory Negligence.

POINT I.

The rules as to the defense of assumption of risk in an action under the Jones Act have been well settled.

(a) A seaman assumes the risk normally incident to his calling.

(b) Because of the peculiar nature of a seaman's relationship with his employers while at sea, he does not assume the risk of negligently unsafe equipment or working place, even though such condition is known to him.

It has always been held that the seaman assumes the risk normally incident to his perilous calling. See *"The Iroquois"*, 194 U. S. 240, 243, 48 L. Ed. 955.

This Court in the case of *The Arizona* v. *Anelich* (1936), 298 U. S. 110, had before it the question as to whether assumption of risk could be interposed as a defense in a Jones Act case to recover damages for injuries to a seaman caused by negligently defective equipment.

No question was involved as to the choice of equipment. The only equipment available for the seaman to use had been found to be negligently defective and the sole question was whether the seaman's knowledge of this condition barred his recovery.

This Court, after an exhaustive review of the authorities, concluded that such defense was not available under these circumstances.

This decision was based on the fact that prior to the Jones Act assumption of risk was not available as a defense in similar cases and that the Jones Act did not "purport to enlarge or modify the defenses

available in maritime law to suits brought to recover for such injuries" This Court pointed out that this conclusion had been reached generally by the lower Federal courts, although not with entire unanimity.

(c) Where, however, the seaman voluntarily abandons the safe, for the unsafe, equipment or working place, he assumes the risk incident to such choice.

In the case of *Hardie* v. *New York Harbor Dry Dock Corporation,* 9 Fed. (2nd) 545 (C. C. A. 2nd 1925), action had been brought under the Jones Act for injuries and death resulting from a seaman falling into a coal bunker. It appeared that the deceased, in going aft to perform his work, had two routes open to him, one over a lighted deck, the other through a dark passageway. He chose the latter and, in the darkness, tripped over a pipe and fell into the coal bunker.

The District Court had dismissed the complaint. In the course of its opinion affirming the judgment, the Appellate Court said at page 546:

> "If there be two ways, one safe and the other dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him. *Beulah Coal Co.* v. *Verburgh,* 292 F. 34 (C. C. A. 8); *Williams Cooperage Co.* v. *Headrick,* 159 F. 680, 86 C. C. A. 548 (C. C. A. 8); *The Indrani,* 101 F. 596, 41 C. C. A. 511 (C. C. A. 4)."

In *Holm* v. *Cities Service T. Co.,* 60 Fed. (2nd) 721 (C. C. A. 2nd 1932), the same Court states the rule as follows, at page 723:

> "* * * That a seaman does not assume the risk of injury caused by the unseaworthiness of the

ship or defective appliances even though known to him, *Cricket S. S. Co.* v. *Parry* (C. C. A.) 263 F. 523, is not decisive in this case. Of course, seamen on duty must use what is furnished for their use because they cannot quit, and shipowners cannot relieve themselves of liability to their seaman for injuries caused by the unseaworthiness of their ships or defective appliances which they require seamen with no real choice in the matter to use. But this doctrine is not to be pressed to the point where a seaman not acting under orders is relieved of the risks incident to his employment which are known and obvious to him. To this extent it has long been a part of the maritime law that seamen do assume the obvious or known risks of their employment."

Similarly, in *Scheffler* v. *Moran Towing and Transportation Co.*, 68 Fed. (2nd) 11 (C. C. A. 2nd 1933), the court said at page 12:

"It is indeed true in general that a seaman at sea does not assume the risk of any unseaworthiness, though it be known to him when he embarks. * * * This does not however excuse him when he has an alternative. * * *"

In *Johnson* v. *U. S.*, 74 Fed. (2nd) 703 (C. C. A. 2nd, 1935), the Court stated the rule very clearly at page 704:

"A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation."

In *Hunt* v. *Hobbs Wall & Co.*, 42 Fed. (2nd) 437 (C. C. A. 9th, 1930), the seaman was killed by falling

from a beam on which he was standing while attempting to free a timber being hoisted from the hold the court affirmed the holding of the District Court that there was no liability, in the following language at page 438:

> "The Proctors have shown commendable industry and zeal in marshalling the authorities on the subject of assumption of risk, on seaworthiness, negligence, etc., but after all is said and done the simple fact remains that this beam was not intended as a place to work, its situation was obvious, its dangers, such as they were, clearly manifest; the decedent was neither directed to use the beam nor did his duties necessarily require him to do so."

In *Tampa Interocean S. S. Co.* v. *Jorgensen*, 93 Fed. 2nd, 927 (C. C. A. 5th, 1938), the Court held at page 930 that the following charge given by the District Court was not erroneous:

> "You are instructed that if the plaintiff was furnished two methods of entering the 'tween-deck space, one obviously safe and the other obviously unsafe, and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable."

POINT II.

The Arizona and _Beadle_ cases in no way modified the rules as above stated.

The Arizona v. *Anelich, supra,* involved an action to recover damages for injuries and death of a seaman caused at sea by a defective power winch he was using in the course of his employment. There was no suggestion that any other equipment was

available or that he had any choice except to use the particular equipment given him. The case had been initiated in the State Courts of Washington and the State Supreme Court, in sustaining the judgment of the trial court, held that *in the circumstances disclosed* assumption of risk was not a defense in a suit under the Jones Act.

Beadle v. *Spencer* (1936), 298 U. S. 124, involved an action under the Jones Act for injuries to a seaman who fell into an open hatch while engaged in unloading lumber.

While appellants apparently sought to raise a question as to the seaman's employing a dangerous method while a safe one was available, this Court in disposing of this point at page 130 says:

> "Respondent was using the defectively piled lumber as a platform on which to stand when adjusting the sling under some of the lumber about to be unloaded. There is no suggestion in the evidence or by petitioner's requests that he could have stood elsewhere when performing that operation, *or that he had any choice but to do his work there or leave the vessel.*" (Italics ours.)

This Court was concerned principally in the *Beadle* case with disposing of the contention that the rule should be different because the ship was engaged in coastwise trade and was in port rather than at sea.

In neither of the above cases did the seaman have a choice between a safe and an unsafe method or working place. In neither opinion were the cases establishing the rule heretofore discussed cited or referred to in any way.

The effect of the *Arizona* and *Beadle* cases was to clarify the rule already recognized by most Federal courts, that in a case where no choice is available, a seaman injured by negligently defective equipment can not be met by the defense that since he knew of the defects he assumed the risk and can not recover. It is made perfectly clear that the reason for this rule is the lack of any real choice on the part of the seaman to use or decline to use the only equipment provided for him.

POINT III.

The opinion below, in stating that "a sailor can not be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice", creates a new rule of law contrary to the uniform prior holdings.

This new ruling is not justified by the *Arizona* and *Beadle* cases but is contrary to the principles they set forth.

The Court below in the instant case recognized that petitioner's contention that the lower court should have submitted to the jury the effect of respondent's abandoning an obviously safe place to do his work in favor of an obviously unsafe place, was sharply raised by the refusal of the trial judge to recognize assumption of risk as a defense under any circumstances.

The Court then proceeded to squarely determine this question by affirming the judgment and ruling that a sailor can not be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice.

The only cases the Court discusses in reaching this conclusion are the *Arizona* and *Beadle* cases. The Court acknowledges that these decisions were not rendered in cases where the seaman had a choice of places within which to work or of equipment for use in his work. The Court cites no case, nor has petitioner been able to find any case, where this question of choice was raised, which gives any support to the ruling announced.

Since the *Arizona* and *Beadle* cases did not involve a choice of methods and did not cite or refer to the long line of cases establishing assumption of risk where such choice exists, Petitioner respectfully urges that the decisions in the *Arizona* and *Beadle* cases in no way justify the ruling stated by the Circuit Court of Appeals for the Second Circuit in the instant case.

POINT IV.

The lower court's interpretation of these cases is in conflict with that of the Circuit Court of Appeals for the Fifth Circuit.

The case of *Tampa Interocean S. S. Co.* v. *Jorgensen, supra,* was decided by the Circuit Court of Appeals for the Fifth Circuit in 1938. Although the opinion refers specifically to the decisions of this Court in the *Arizona* and *Beadle* cases, it is nevertheless obvious that that Court does not construe those cases as eliminating assumption of risk when the seaman voluntarily chooses the unsafe method.

In that case the plaintiff had received injuries by falling through a hatchway. Plaintiff recovered and the judgment was affirmed by the Circuit Court of Appeals. After referring to the decisions in the *Arizona* and *Beadle* cases, the Circuit Court of Ap-

peals for the Fifth Circuit goes on to quote with approval the language in the *Hardie* case, *supra*, that

> "If there be two ways, one safe and the other dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him."

The Court concludes its opinion with the ruling that the District Judge was correct in charging as follows:

> "You are instrueted that if the plaintiff was furnished two methods of entering the 'tween-deck space, one obviously safe and the other obviously unsafe, and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable."

The case of *American Pacific Whaling Company* v. *Kristensen*, 93 Fed. (2nd) 17 (C. C. A. 9th. 1937), was a Jones Act case decided subsequent to the *Arizona* and *Beadle* cases. The opinion refers specifically to these cases as authority for the ruling that assumption of risk is not a defense under the Jones Act. The Court accordingly affirmed a ruling of the District Judge, refusing to admit any evidence in support of assumption of risk.

An examination of the opinion, however, indicates that no question was raised in that case of any choice of equipment. The seaman was injured by a defective whaling-gun. There is no evidence that he had any choice between this and any other whaling-gun.

The decision of the Circuit Court of Appeals for the Ninth Circuit, therefore, is ambiguous and supports neither the interpretation placed by the Second Circuit, nor that placed by the Fifth Circuit upon the decisions of this Court in the *Arizona* and *Beadle* cases.

POINT V.

Improper denial of the defense of assumption of risk is not cured by the existence of the defense of contributory negligence.

The Court below in the instant case cites a growing tendency to limit the defense of assumption of risk and states that the penalty on the seaman for his carelessness in choosing the unsafe method is an abatement of his recovery in proportion to his own contributory negligence.

It is submitted, however, that the existence of the defense of contributory negligence to the extent of mitigating the damages is not an adequate substitute for the defense of assumption of risk. It is entirely conceivable that a seaman who has abandoned a safe working place for an obviously unsafe one may conduct himself with extreme care and still be injured because of the dangers inherent in the place he has chosen to work in, merely to save his own time or show his contempt for safety devices, or for some other reason.

That assumption of risk and contributory negligence are separate and distinct defenses is pointed out by Judge Hough in *McAdoo* v. *Anzellotti*, 271 Fed. Rep. 268 (C. C. A. 2nd, 1921).

CONCLUSION.

For the reasons stated, and on the authority of the cases cited, it is respectfully submitted that the petition should be granted.

HENRY B. POTTER,
Counsel for Petitioner.

LOUIS MEAD TREADWELL,
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